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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ALBERT OMAR MARTINEZ, Defendant and Appellant.	G045410 (Super. Ct. No. 09NF2797) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary S. Paer, Judge. Affirmed.

Dennis L. Cava, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and, Susan Miller, Deputy Attorney Generals, for Plaintiff and Respondent.

A jury found Albert Omar Martinez guilty of committing a lewd act upon a child (Pen. Code, § 288, subd. (c)(1), count 1),[1] and attempting to commit a lewd act upon a child (§§ 664, 288, subd. (c)(1), count 2). The trial court sentenced Martinez to five years supervised formal probation. Martinez argues his federal and state due process rights were violated when the court failed to expressly rule on his motion to reduce his felony convictions to misdemeanors pursuant to section 17, subdivision (b). We disagree and affirm the judgment.

FACTS

Martinez visited Soak City Water Park in Buena Park. While in the tidal wave pool, Martinez put his hands on his hips and thrust his pelvis towards 15-year-old Salina L. Salina L. told police she felt something hard touch her butt and saw Martinez standing behind her. She thought the hard object was Martinez's penis. That same day, 14-year-old Dianne M. felt someone's hands on her back three times and saw Martinez standing behind her. Dianne M.'s mother's boyfriend was nearby. He observed Martinez lean back and spread his legs behind Dianne M. Martinez denied having any contact with Salina L. and Dianne M.

The information charged Martinez with two felony counts of committing a lewd act upon a child (§ 288, subd. (c)). After hearing the trial testimony, the jury found Martinez guilty of committing a lewd act upon a child and attempting to commit a lewd act upon a child. Before sentencing, Martinez moved to reduce the felonies to misdemeanors under section 17, subdivision (b).

At the sentencing hearing, the trial court stated he had read the probation and sentencing report, the prosecutor's and defense counsel's sentencing briefs, psychological report, and all letters. After the prosecutor argued for a two-year prison sentence, the court invited defense counsel's comments and stated, "I did read your brief.

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[1] All further statutory references are to the Penal Code.

A lot of things you mentioned or rephrased in the [probation] report. Obviously, you want probation. You feel he is suitable for many reasons we have already discussed." When defense counsel submitted, the court granted probation based on Martinez's lack of prior felonies, favorable probation report, and positive psychological report. During sentencing, the trial court remarked, "the type of touching is different than the quote other type of [section] 288's that we normally see, but it's still a violation. It's still illegal. He's still going to suffer the brunt of the [section] 288.1 conviction." The court sentenced Martinez to five years supervised formal probation.

DISCUSSION

Martinez contends the trial court's failure to expressly rule on his section 17, subdivision (b), motion violated his constitutional due process rights to an informed sentencing decision. We disagree.

Section 17, subdivision (b)(3), provides: "When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail . . . it is a misdemeanor for all purposes . . . [¶] When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor." In other words, section 17, subdivision (b)(3), empowers the trial court to declare a wobbler offense a misdemeanor, in that situation, upon application of the defendant. The decision to reduce a wobbler offense rests within the trial court's discretion. (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977 (*Alvarez*).) The burden falls upon the defendant to demonstrate the trial court's decision is arbitrary or unreasonable. (*Ibid*.) Section 288, subdivision (c)(1), is a wobbler as it is punishable either with prison or jail time.

Although neither party discusses the case, *People v. Erdelen* (1996) 46 Cal.App.4th 86 (*Erdelen*), is instructive. In that case, the trial court stated its reasons for denying probation and imposing the upper term for a felony offense but failed to

provide reasons for not reducing the felony to a misdemeanor. (*Id.* at p. 90.) The court denied probation because defendant had a significant record of similar criminal acts and would be a danger to society. (*Ibid.*) Defendant complained the trial court did not state its reasons for not reducing the felony offense to a misdemeanor. (*Ibid.*) The Court of Appeal opined, "The court's statement of its reasons for denying probation and for imposing the upper term clearly indicate the court would not have considered reducing appellant's offense to a misdemeanor." (*Ibid.*)

Here, based on the record before us, we conclude the trial court implicitly denied Martinez's section 17, subdivision (b), motion. Before sentencing, Martinez filed a brief requesting the court reduce his felony convictions to misdemeanors pursuant to section 17, subdivision (b). At the sentencing hearing, the court indicated he read Martinez's sentencing brief and considered his arguments. The court provided a detailed explanation as to why it was granting Martinez probation but did not discuss Martinez's request to reduce the felony offenses to misdemeanors. The court explained that although the touching was through clothing and not the most severe the court had seen, Martinez's conduct was "still a violation[]" and was "still illegal." The court stated Martinez was "going to suffer the brunt of [his] conviction." Additionally, the court remarked Martinez would be subject to "all the other normal terms and conditions of a *felony* probation." (Italics added.) The court's comments demonstrate it did not intend to reduce Martinez's felony offenses to misdemeanors.

Additionally, Martinez waived his claim that the court failed to properly articulate its decision to deny his section 17, subdivision (b), motion by not objecting at the time of sentencing. In *Erdelen, supra,* 46 Cal.App.4th at page 91, after discussing *People v. Scott* (1994) 9 Cal.4th 331, the Court of Appeal concluded defendant waived any error in the trial court's statement of reasons because defendant and his counsel were aware the trial court would treat the offense as a felony and were silent.

At the sentencing hearing, Martinez neither renewed his section 17, subdivision (b), motion nor requested the trial court provide a statement of reasons for denying the motion. The court allowed Martinez and his defense counsel ample opportunity to argue the request. Martinez's counsel argued for probation but was silent on the section 17, subdivision (b), motion. Because Martinez did not state on the record any objections to the court's failure to provide reasons for denying the section 17, subdivision (b) motion, he did not properly preserve the issue for appeal.

DISPOSITION

This judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

BEDSWORTH, J.